

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ENRIQUE LAGUNAS.

Plaintiff,

Case No. 2:18-cv-02039-MMD-CLB

v.

NEVADA BOARD OF PRISON
COMMISSIONERS, *et al.*,

Defendants.

ORDER

I. SUMMARY

Pro se Plaintiff Enrique Lagunas brings this 42 U.S.C. § 1983 action, alleging that Defendants¹ were deliberately indifferent to his serious medical needs in violation of the Eighth Amendment when Defendants failed to treat his Hepatitis C (“Hep C”) condition. (ECF Nos. 4, 5.) Before the Court is the Report and Recommendation of United States Magistrate Judge Carla L. Baldwin. (ECF No. 43 (“R&R”).) The R&R recommends granting Defendants’ summary judgment motion (ECF No. 35). Lagunas timely filed an objection to the R&R. (ECF No. 44 (“Objection”).)² Because the Court agrees with Judge Baldwin that Lagunas has failed to meet his burden on summary judgment—as further explained below—the Court overrules the Objection and adopts the R&R in full.

II. BACKGROUND

The Court incorporates by reference Judge Baldwin's recitation of the factual background provided in the R&R, which the Court adopts here. (ECF No. 43 at 2-4.)

¹Current Defendants in this action are Brian Sandoval, Barbara Cegavske, Adam Laxalt, James Dzurenda, Romeo Aranus, Rene Pena, Ben Gutierrez, Sonya Carillo, and Frank Dreesen (collectively, “Defendants”). (ECF Nos. 4 at 9, 5 at 3-6.) On September 30, 2019, the Court dismissed the Nevada Board of Prison Commissioners, Jerry Howell, and David Tristan. (ECF No. 4 at 9-11.) On May 3, 2021, the Court also dismissed Francisco Sanchez. (ECF No. 34.)

²Defendants filed a response to the Objection. (ECF No. 45.)

1 **III. LEGAL STANDARD**

2 **A. Review of the Magistrate Judge's Recommendation**

3 This Court "may accept, reject, or modify, in whole or in part, the findings or
4 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Where a party
5 timely objects to a magistrate judge's report and recommendation, then the Court is
6 required to "make a de novo determination of those portions of the [report and
7 recommendation] to which objection is made." *Id.* The Court's review is thus *de novo*
8 because Lagunas timely filed his Objection (ECF No. 44).

9 **B. Summary Judgment**

10 "The purpose of summary judgment is to avoid unnecessary trials when there is no
11 dispute as to the facts before the court." *Nw. Motorcycle Ass'n v. United States Dep't of*
12 *Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted). Summary judgment is
13 appropriate when the pleadings, the discovery and disclosure materials on file, and any
14 affidavits "show there is no genuine issue as to any material fact and that the movant is
15 entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
16 An issue is "genuine" if there is a sufficient evidentiary basis on which a reasonable fact-
17 finder could find for the nonmoving party and a dispute is "material" if it could affect the
18 outcome of the suit under the governing law. See *Anderson v. Liberty Lobby, Inc.*, 477
19 U.S. 242, 248-49 (1986).

20 Where reasonable minds could differ on the material facts at issue, however,
21 summary judgment is not appropriate. See *id.* at 250-51. "The amount of evidence
22 necessary to raise a genuine issue of material fact is enough 'to require a jury or judge to
23 resolve the parties' differing versions of the truth at trial.'" *Aydin Corp. v. Loral Corp.*, 718
24 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253,
25 288-89 (1968)). In evaluating a summary judgment motion, a court views all facts and
26 draws all inferences in the light most favorable to the nonmoving party. See *Kaiser Cement*
27 *Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986) (citation omitted).

1 The moving party bears the burden of showing that there are no genuine issues of
 2 material fact. See *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). Once
 3 the moving party satisfies the requirements of Federal Rule of Civil Procedure 56, the
 4 burden shifts to the party resisting the motion to “set forth specific facts showing that there
 5 is a genuine issue for trial.” *Anderson*, 477 U.S. at 256. The nonmoving party “may not
 6 rely on denials in the pleadings but must produce specific evidence, through affidavits or
 7 admissible discovery material, to show that the dispute exists,” *Bhan v. NME Hosps., Inc.*,
 8 929 F.2d 1404, 1409 (9th Cir. 1991), and “must do more than simply show that there is
 9 some metaphysical doubt as to the material facts.” *Orr v. Bank of Am.*, 285 F.3d 764, 783
 10 (9th Cir. 2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,
 11 586 (1986)). “The mere existence of a scintilla of evidence in support of the plaintiff’s
 12 position will be insufficient[.]” *Anderson*, 477 U.S. at 252.

13 **IV. DISCUSSION**

14 Following a *de novo* review of the R&R and other records in this case, the Court
 15 finds good cause to accept and adopt Judge Baldwin’s R&R.

16 Judge Baldwin recommends that Defendants be granted summary judgment as
 17 Lagunas has not produced evidence which demonstrates an issue of fact exists as to
 18 whether Defendants were deliberately indifferent to Lagunas’s medical needs. (ECF No.
 19 43 at 10.) This was due to Lagunas’s failure to oppose Defendants’ summary judgment
 20 motion.³ (*Id.*) Moreover, to the extent that Lagunas’s claim is based on his disagreement
 21 with Defendants’ choice of treatment, this does not amount to deliberate indifference. (*Id.*
 22 (citing *Toguchi v. Chung*, 391 F.3d 1050, 1057 (9th Cir. 2004))). Lagunas appears to make
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 25 ³In his Objection, Lagunas appears to explain his lack of opposition to Defendants’
 26 summary judgment motion was due to the following reasons: 1) Nevada had just come off
 27 a declaration of emergency, 2) Lagunas did not know how to answer the motion, and 3)
 28 the law library at Southern Desert Correctional Center (“SDCC”) was closed. (ECF No. 44
 at 8-9.) While the Court is sympathetic towards Laquenas’s expressed circumstances,
 Laquenas must nevertheless comply with the procedural rules governing Defendants’
 motion. See *Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir. 1995) (per curiam). However, in
 light of Laquenas’s *pro se* status, the Court will address in this order his opposition to
 granting summary judgment to Defendants.

1 several objections and argues the following.⁴ First, Lagunas argues that Defendants were
 2 not following Medical Directive 219 (“MD 219”) despite their assertion that Lagunas was
 3 treated appropriately. (ECF No. 44 at 3.) Second, treatment was “totally unacceptable”
 4 when Lagunas’s aspartate aminotransferase to platelet ratio index (“APRI”) levels kept
 5 progressively rising. (*Id.* at 4.) Third, the Board and Former Directors should have “taken
 6 action to fix, repair, and or adjust medical treatment in policies as needed.”⁵ (*Id.* at 5.)
 7 Fourth, there is a genuine dispute of fact because a reasonable jury could find for Lagunas
 8 based on a similar case. (*Id.*) Finally, Medical Director Michael Minev could not have
 9 decided that Lagunas did not need treatment when the medical notes were illegible and
 10 Minev did not know if a qualified person saw Lagunas.⁶ (*Id.* at 8.) Because the Court does
 11 not find these arguments convincing, the Court will set forth the legal standard for Eighth
 12 Amendment deliberate indifference claims and will address Lagunas’s relevant arguments
 13 in turn.

14 **A. Deliberate Indifference to a Serious Medical Need**

15 The Eighth Amendment prohibits the imposition of cruel and unusual punishment
 16 and “embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity, and
 17 decency.’” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). A prison official violates the Eighth
 18 Amendment when he or she acts with “deliberate indifference” to the serious medical
 19 needs of an inmate. See *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). “To establish an
 20 Eighth Amendment violation, a plaintiff must satisfy both an objective standard—that the
 21 deprivation was serious enough to constitute cruel and unusual punishment—and a

22
 23 ⁴The Court notes that it finds it difficult to decipher Lagunas’s arguments in the
 24 manner it was written in the Objection. As such, the Court construes Lagunas’s arguments
 accordingly as stated in this order.

25 ⁵The Court construes “Board and Former Directors” as meaning the Nevada Board
 26 of Prison Commissioners (the “Board”). The Board is an agency of the State of Nevada
 27 and thus an arm of the State and not a person for purposes of § 1983. See *Howlett v. Rose*, 496 U.S. 356, 365 (1990). The Court previously dismissed the Board from this
 action (ECF No. 4 at 3-4, n.1), therefore the Court declines to address the merits of this
 argument.

28 ⁶Michael Minev is not named in Lagunas’s complaint as a defendant. (ECF No. 5).
 The Court therefore declines to address this objection.

1 subjective standard—deliberate indifference.” *Snow v. McDaniel*, 681 F.3d 978, 985 (9th
2 Cir. 2012).

3 To establish the first prong, “the plaintiff must show a serious medical need by
4 demonstrating that failure to treat a prisoner’s condition could result in further significant
5 injury or the unnecessary and wanton infliction of pain.” *Jett v. Penner*, 439 F.3d 1091,
6 1096 (9th Cir. 2006) (internal quotations omitted). To satisfy the deliberate indifference
7 prong, a plaintiff must show “(a) a purposeful act or failure to respond to a prisoner’s pain
8 or possible medical need and (b) harm caused by the indifference.” *Id.* “Indifference may
9 appear when prison officials deny, delay or intentionally interfere with medical treatment,
10 or it may be shown by the way in which prison physicians provide medical care.” *Id.*
11 (internal quotations omitted). When an inmate alleges delay of medical treatment evinces
12 deliberate indifference, the inmate must show the delay led to further injury. See *Shapley*
13 *v. Nev. Bd. of State Prison Comm’rs*, 766 F.2d 404, 407 (9th Cir. 1985) (holding that “mere
14 delay of surgery, without more, is insufficient to state a claim of deliberate medical
15 indifference”).

16 However, “a complaint that a physician has been negligent in diagnosing or treating
17 a medical condition does not state a valid claim of medical mistreatment under the Eighth
18 Amendment. Medical malpractice does not become a constitutional violation merely
19 because the victim is a prisoner.” *Estelle*, 429 U.S. at 106. Even gross negligence is
20 insufficient to establish deliberate indifference to serious medical needs. See *Toguchi*, 391
21 F.3d at 1060.

22 A difference of opinion between medical professionals concerning the appropriate
23 course of treatment generally does not amount to deliberate indifference to serious
24 medical needs. See *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). Additionally, “[a]
25 difference of opinion between a prisoner-patient and prison medical authorities regarding
26 treatment does not give rise to a § 1983 claim.” *Franklin v. Or. State Welfare Div.*, 662
27 F.2d 1337, 1344 (9th Cir. 1981). To establish that a difference of opinion amounted to
28 deliberate indifference, the inmate “must show that the course of treatment the doctors

1 chose was medically unacceptable under the circumstances" and "that they chose this
2 course in conscious disregard of an excessive risk to [the prisoner's] health." *Jackson v.*
3 *McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996).

4 **B. Medical Directive 219**

5 Lagunas argues that Defendants were not following MD 219. (ECF No. 44 at 3.)
6 More specifically, Lagunas directs the Court to § 219.04's priority level 2 classification for
7 inmates with APRI scores of 0.70 and higher, to presumably argue that his classification
8 as priority level 2 entitled him to treatment. (ECF No. 44 at 3.) The Court disagrees.

9 Lagunas's reliance on § 219.04 is misplaced because it was not in effect at the
10 relevant time Lagunas's allegations arose in this action. Section 219.04 created a priority-
11 level criteria for Hep C treatment and became effective in July 2020. (ECF No. 35-3 at 17-
12 22.) Lagunas filed this action in September 2018. (ECF No. 1.) The prior—and relevant—
13 version of MD 219 did not include the priority-level criteria, and thus Lagunas's argument
14 is not sound. See *In Re HCV Prison Litig.*, Case No. 3:19-cv-00577-MMD-CLB ("HCV
15 Prison Litig."), ECF No. 10-2 (D. Nev. Dec. 9, 2019) (prior version of MD 219, "Eff. May
16 17, 2017").

17 Even if the Court were to apply the appropriate version of MD 219 to Lagunas's
18 argument, Lagunas would be unable to show Defendants were not following MD 219.
19 Section 219.01 sets forth the treatment of Hep C, and Subsection 2 sets forth the exclusion
20 criteria for treatment. Section 219.01(2) expressly states that exclusion for treatment
21 includes an "APRI score of < 2.0." Here, the record shows that Lagunas had an APRI
22 score of 0.76 in May 2017. (ECF No. 25-2 at 16-17.) On May 16, 2017, an official response
23 from the Nevada Department of Corrections ("NDOC") informed Lagunas that he needed
24 an "Apri score greater than 2" for his case to be sent to the Hepatitis C Review Committee.
25 (ECF No. 35-1 at 2.) Lagunas would have known about this requirement, as the record
26 further shows that on January 27, 2017, an NDOC staff member had informed Lagunas
27 that he needed an APRI score of 2.0 to be considered for treatment. (*Id.* at 4.) Accordingly,
28 the Court does not find that Defendants were not following MD 219.

C. Rising APRI Levels

Lagunas argues the treatment he received was “totally unacceptable” because the NDOC medical staff knew he had Hep C and that his APRI levels kept on rising. (ECF No. 44 at 4.) The Court is unconvinced by this argument.

Medical progress notes in the record show Lagunas's APRI scores were observed by the NDOC. (ECF No. 37-2 (sealed).) The notes also show NDOC staff had spoken to Lagunas about his Hep C and were monitoring his condition. (*Id.*) Lab results further show Lagunas had the following APRI score: 0.64 in January 2017, 0.76 in May 2017, 0.89 in July 2017, 0.62 in January 2018, and 0.48 in August 2019. (ECF No. 25-2 (sealed).) Although Lagunas argues he should have received treatment as his APRI scores increased, the record shows that he was being monitored and lab results also reveal that his scores decreased beginning in January 2018. (*Id.*) Moreover, while Lagunas argues the treatment he received was unacceptable based on his increasing APRI score, a difference of opinion between an inmate and prison medical authorities regarding treatment does not rise to a § 1983 claim. See *Franklin*, 662 F.2d at 1344.

D. Genuine Dispute of Fact

In his Objection, Lagunas recites a portion of the summary judgment legal standard from Judge Baldwin’s R&R that “[a] dispute is ‘genuine’ only where a reasonable jury could find for the nonmoving party.” (ECF No. 44 at 5 (quoting ECF No. 43 at 4).) Lagunas appears to do so to argue, and the Court construes as such, that based on *HCV Prison Litig.*, that a jury could find for Lagunas that Defendants were deliberate indifferent to his serious medical need. (*Id.*) Defendants counter that the Consent Decree in *HCV Prison Litig.* merely dealt with the treatment of inmates and no party made any admission of law or fact. (ECF No. 45 at 5.) The Court agrees with Defendants.

At the summary judgment phase of litigation, an issue is “genuine” if there is a sufficient evidentiary basis on which a reasonable fact-finder could find for the nonmoving party and a dispute is “material” if it could affect the outcome of the suit under the governing law. See *Anderson*, 477 U.S. at 248-49. Here, Defendants submitted

1 authenticated evidence regarding the medical treatment Lagunas received for his Hep C
2 condition (ECF Nos. 35-1 - 35-13, 37-1 - 37-3 (sealed)), and Lagunas failed to file an
3 opposition to Defendants' motion for summary judgment. Therefore, Judge Baldwin
4 appropriately found that Lagunas did not come forward with any evidence to create an
5 issue of fact as to whether Defendants deliberately denied or delay treatment. (ECF No.
6 43 at 8-10.)

7 Because of Lagunas's *pro se* status, the Court considers his argument that a jury
8 could find for him because the Court, in *HCV Prison Litig.*, found for a class of inmates
9 with Hep C in a similar suit against the NDOC. (ECF No. 44 at 5-6.) In *HCV Prison Litig.*,
10 a class of inmates in NDOC custody alleged, in part, that the NDOC violated the Eighth
11 Amendment when they failed to provide adequate medical care according to the clearly
12 established medical standard of care. See *HCV Prison Litig.*, ECF No. 10. On October 29,
13 2020, the parties entered a Consent Decree that established the treatment and monitoring
14 of inmates with Hep C in NDOC custody. See *HCV Prison Litig.*, ECF No. 80. The Decree
15 expressly stated that, “[b]y agreeing to entry of this Consent Decree, the Parties make no
16 admission of law or fact with respect to the allegations in the Complaint.” (*Id.*) As such,
17 and despite Lagunas's argument, Defendants are not admitting liability nor has the Court
18 “found for the plaintiffs” as Lagunas argues. (ECF No. 44 at 5.) The Court, having
19 examined *HCV Prison Litig.*, cannot construe the case in Lagunas's favor as evidence a
20 jury could find for him that Defendants were deliberate indifferent to his Hep C condition.
21 Lagunas therefore has not produced evidence demonstrating an issue of fact to meet his
22 burden on summary judgment, and the Court will thus grant summary judgment in favor
23 of Defendants.

24 **V. CONCLUSION**

25 The Court notes that the parties made several arguments and cited to several cases
26 not discussed above. The Court has reviewed these arguments and cases and determines
27 that they do not warrant discussion as they do not affect the outcome of Defendants'
28 motion for summary judgment before the Court.

1 It is therefore ordered that the Report and Recommendation of Magistrate Judge
2 Carla L. Baldwin (ECF No. 43) is accepted and adopted in full.

3 It is further ordered that Defendants' motion for summary judgment (ECF No. 35)
4 is granted.

5 The Clerk of Court is directed to enter judgment accordingly and close this case.

6 DATED THIS 13th Day of December 2021.

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10 MIRANDA M. DU
11 CHIEF UNITED STATES DISTRICT JUDGE
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